No. 21-15430

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ACA CONNECTS – AMERICA'S COMMUNICATIONS ASSOCIATION,
CTIA – THE WIRELESS ASSOCIATION,
NCTA – THE INTERNET & TELEVISION ASSOCIATION, and
USTELECOM – THE BROADBAND ASSOCIATION,
Plaintiffs-Appellants,

v.

XAVIER BECERRA,* in his official capacity as Attorney General of California,
Defendant-Appellee,

On Appeal from the United States District Court for the Eastern District of California, No. 2:18-cv-02684, Hon. John A. Mendez

BRIEF OF *AMICUS CURIAE* INTERNATIONAL CENTER FOR LAW & ECONOMICS
***in support of* PLAINTIFFS-APPELLANTS AND REVERSAL OF THE DISTRICT COURT'S ORDER**

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INTEREST OF *AMICUS CURIAE*[2]

The International Center for Law & Economics ("ICLE") works with more than 50 affiliated scholars and research centers around the world to promote governance rooted in the rule of law and the development of economically grounded policies that promote consumer welfare. ICLE scholars have studied and written extensively on the law and economics of telecommunications markets and regulation.

ICLE supports the appeal filed by ACA Connects et al. seeking review of the district court's denial of a preliminary injunction. As detailed herein, the district court failed to consider economic and empirical realities that militate in favor of finding irreparable harm to the Appellants' members. Moreover, the same economic and empirical realities tip the balance of equities in favor of the Appellants, and establish that the public interest is in granting a preliminary injunction against enforcement of the California Internet Consumer Protection and Net Neutrality Act of 2018 ("SB-822").

[2] All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2). No counsel for any party authored this brief in whole or in part, no party or party's counsel has contributed money intended to fund the preparation or submission of the brief, and no individual or organization contributed funding for the preparation and submission of the brief. *See id.* 29(a)(4)(E).

SUMMARY OF ARGUMENT

In 2018, the FCC issued its *Restoring Internet Freedom Order*, 33 FCC Rcd. 311 (2018) ["2018 Order"], which returned broadband Internet access service ("broadband") to a classification as a Title I information service. The FCC determined that a "light touch" regulatory regime was necessary to promote investment in broadband. *Id.* ¶¶ 1-2. While removing the "no-blocking" and "no-throttling" rules previously imposed under the 2015 Open Internet Order, *Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd. 5601 (2015) ["2015 Order"], the FCC also removed the "general conduct" standard—an open-ended regulatory catch-all that would permit the FCC to examine any conduct of broadband providers that it deemed potentially threatening to Internet openness. *Cf.* 2018 Order ¶¶ 239-245. Yet, notably, the FCC elected to keep a version of the 2015 Order's transparency rule in place, which requires broadband providers to disclose any blocking, throttling, paid prioritization, or similar conduct. *Id*.

In retaining the transparency rule, the FCC noted that the FTC and state attorneys general are in a position to prevent anticompetitive consumer harm through the enforcement of consumer protection and antitrust laws. *See* 2018 Order ¶ 142. Thus, the overarching goal of the 2018 Order was to ensure business conduct which could be beneficial to consumers was not foreclosed by regulatory fiat, as would have been the case under the 2015 Order, while empowering the FCC, FTC, and state attorneys general to identify and address discrete consumer harms.

The *Mozilla* court noted that the FCC could invoke conflict preemption principles in order to prevent inconsistent state laws from interfering with the 2018 Order. *Mozilla Corp. v. FCC,* 940 F.3d 1, 85 (D.C. Cir. 2019) (per curiam). Without such preemption, a patchwork of inconsistent state laws would confuse compliance efforts and drive up broadband deployment costs. *Cf. Id*. Relying as it does on a common carriage approach to regulating the Internet, and fragmenting the regulation of broadband providers between the federal and state levels, SB-822 is at odds with the purpose of the 2018 Order.

The district court found the balance of the equities and the public interest both weighed in favor of California in enforcing SB-822, stating the law "provides crucial protections for California's economy, democracy, and society as a whole," Transcript of Proceedings, *American Cable Ass'n v. Becerra*, No. 2:18 cv-02684 (E.D. Cal. Feb. 23, 2021) (ER-7–78) ["Tr."], and that a preliminary injunction would "negatively impact the State of California more than [it would benefit] the ISP companies." *Id*. at 69. In denying the motion for a preliminary injunction, the court also found the Appellants failed to show a likelihood of success on the merits. *Id.* at 67.

The district court wrongly concluded the balance of equities tips in favor of Defendant-Appellee, the state of California, and incorrectly assumed that the Appellants' members would not suffer irreparable harm. The economics underlying broadband deployment, combined with competition and consumer protection law, provide adequate protection to consumers and firms in the marketplace without enforcement of SB-822. And, because of the sovereign immunity provided to California under the Eleventh Amendment, the potential damages suffered by the Appellants' members are unable to be remedied. On the other hand, the enforcement of this law will significantly harm the Appellants' members as well as the public by allowing states to create a patchwork of inconsistent laws and bans on consumer welfare-enhancing conduct like zero-rating.

The district court made crucial errors in its analysis when balancing the equities.

First, when evaluating the likelihood of ISPs acting in ways that would reduce Internet openness, it failed to consider the economic incentives that militate against this outcome.

ISPs operate as multi-sided markets—their ability to draw consumers and edge providers on both sides of their platforms depends on behavior that comports with consumer expectations. Both broadband consumers and edge providers demand openness, and there is no reason to expect ISPs to systematically subvert those desires and risk losing revenue and suffering reputational harm. Contrary to the district court's characterization, the good behavior of ISPs is not attributable to scrutiny during the pendency of the current litigation: rather, it is a rational response to consumer demand and part of a course of conduct that has existed for decades.

Second, the district court discounted the legal backdrop that both would hold ISPs to their promises, as well as prevent them from committing competitive harms.

All of the major ISPs have made public promises to refrain from blocking, throttling, or engaging in paid prioritization. *See infra* Part I (A) at 17. Further, the FCC's 2018 Order creates a transparency regime that would prevent ISPs from covertly engaging in the practices SB-822 seeks to prevent. The FTC's Section 5 authority to prevent "unfair or deceptive acts or practices" empowers that agency to pursue ISPs that make such promises and break them while state attorneys general can also bring enforcement actions under state consumer protection laws. 2018 Order ¶¶ 140-41.

In addition to the consumer protection enforcement noted above, antitrust law provides a well-developed set of legal rules that would prevent ISP's from engaging in anticompetitive conduct. This would include preventing ISPs from entering into anticompetitive agreements with each other, or with edge providers, that harm competition, as well as prevent anticompetitive unilateral conduct.

In summary, the district court failed to properly balance the equities and, in so doing, sanctioned net harm to the public interest. Both the underlying economic incentives and existing laws ensure ISPs will continue to provide broadband service that meets consumer expectations. By contrast, SB-822, in going further than even the 2015 Order, actually permits a great deal of harm against the public interest by presumptively banning practices, like zero-rating, that increase consumer welfare without harming competition.

ARGUMENT

In order for a motion for preliminary injunction to be granted, the moving party has to demonstrate (1) that they are likely to succeed on the merits, (2) that they are likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in their favor, and (4) that an injunction is in the public interest. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The district court found that the Appellants failed to establish any of these elements. Tr. at 67.

Instead, the district court found there would be irreparable harm to California in the form of being unable to enforce a democratically enacted law, which outweighed the "economic harm[s]" to the Appellant's members. *See* Tr. at 69. The district court then found that the public interest was in favor of California enforcing its law and denied a preliminary injunction against the law.

The district court made three significant errors in its analysis of the equities: first, ISPs do have adequate economic incentives to behave in accord with consumer expectations, and second, existing consumer protection and antitrust laws obviate the need for heavy-handed regulation as embodied in SB-822. Third, the areas where SB-822 extends beyond the requirements of the 2015 Order are likely to cause net harm to the public interest. Thus, the balance of the equities and the public interest weigh in favor of granting a preliminary injunction.

During oral arguments, California's counsel argued that, without SB-822, ISPs were in a position to rescind voluntary commitments to refrain from blocking, throttling, and paid prioritization. Tr. at 17. According to California's counsel, if the ISPs were to rescind these commitments, the FTC and state attorneys general would no longer be in a position to enforce them. *See* Tr. at 14-15. Thus, California believes, it would be unable to guarantee an "open" Internet, and the citizens of California would, therefore, be harmed.

The district court agreed, and explicitly rejected that ISPs would voluntarily abide by "openness" requirements, even though their behavior has comported with such expectations. Tr. at 6. The district court assumed the ISPs were only on their "best behavior" because they have been under scrutiny. Tr. at 8. The inference is that the ISPs would feel free to enact measures like blocking, throttling, and paid prioritization once the litigation was ended.

California went further, arguing that ISPs had not even been on their best behavior during the recent past. Its counsel argued that the common practice of "zero-rating" data—allowing consumers to access certain content without incurring additional costs and without it counting towards their data cap in a given period—is an example of problematic behavior that would be forbidden under SB-822. Tr. at 17.

Finally, in addition to believing the potential harm to Appellant's members was merely "economic," the district court also speculated that the FCC is "highly likely" to revive its 2015 rules. Tr. at 24. Therefore, as policy change in the direction of SB-822 was likely in any event, California would not be causing "irreparable harm" from enforcing its own law. *Id.*

The district court's finding that the balance of equities and the public interest were in favor of the state of California is based upon a fundamental misunderstanding of the economic and legal realities ISPs face.

I. THERE IS NO MARGINAL BENEFIT TO THE PUBLIC INTEREST FROM THE ENFORCEMENT OF SB-822

The state of California and the district court only viewed the good behavior of ISPs as a function of being under scrutiny. But "openness" is the status quo of the Internet, and there is little demand from consumers for that to change.

An understanding of the economic incentives facing ISPs shows that there is little or no benefit to the public interest from enforcing SB-822. ISPs are rational actors seeking to maximize the value of their networks, and part of maximizing that value is providing broadband to consumers and connecting with edge providers under terms they find agreeable. Thus, since consumers and edge providers value Internet openness, ISPs have economic and reputational incentives to provide it.

A. The Economics of Broadband Openness

The competitive process is the best tool available to promote consumer welfare in broadband markets. While net neutrality advocates often claim that there is a lack of competition for broadband, the facts belie this narrative. ISPs have invested heavily in building out high speed networks, which proved especially important in responding to soaring demand during the COVID-19 pandemic. *See* Michael Mandel & Elliott Long, *Investment Heroes 2020*, PPI (Jul. 24, 2020), https://bit.ly/3sJflaz. The FCC's recent Fourteenth Broadband Deployment Report also notes the "impressive gains in bringing high-speed broadband service to all Americans." Fourteenth Broadband Deployment Report, *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No.20-269, FCC 21-18, par. 2 (Jan. 19, 2021), https://bit.ly/3wku7GQ.

Critics sometimes allege that there are an insufficient number of competitors in local broadband markets, leading to insufficient competitive pressures shaping those markets. *See, e.g.,* Jonathan Sallet, *Broadband for America's Future: A Vision* *for the 2020s*, Benton Institute for Broadband & Society at 46 (Oct. 2019), https://bit.ly/3pXQ1fA. The number of competitors in a market, however, is not equivalent to the level of competition. *See* Harold Demsetz, *Why Regulate Utilities?*, 11 J. LAW & ECON. 55 (1968) ("[T]he asserted relationship between market concentration and competition cannot be derived from existing theoretical considerations and that it is based largely on an incorrect understanding of the concept of competition or rivalry"). For example, even in the case of natural monopolies, scale economies make it less costly for one firm to produce a good or service in a given market than it is for two or more firms. And, in these markets, competition *for the market* itself can result in an efficient result that prevents the typical welfare harms attributed to anticompetitive monopolies. *Id*.

Nonetheless, most consumers today can choose between at least two competing fixed-line broadband ISPs, along with a number of wireless options or satellite providers—a state of affairs that is more than enough to assure healthy competition, given the scale economies and other features related to broadband deployment. *See* Jonathan E. Nuechterlein & Howard A. Shelanski, *Building on What Works: An Analysis of U.S. Broadband Policy*, Federal Communications Law Journal, SSRN 12-13 and accompanying footnotes (Sept. 2020), https://bit.ly/36TRiN9 ("[T]he unusual cost structure of the broadband industry…

typically results in significant price competition even in duopoly broadband markets.”).

Additionally, ISPs are what are known as multi-sided platforms. Multi-sided platforms create value by bringing two or more different types of participants together in order to facilitate transactions. *See* David S. Evans & Richard Schmalensee (2013), “The Antitrust Analysis of Multi-Sided Platform Businesses,” *NBER Working Paper No. 18783*, https://bit.ly/39O0WCo. For such platforms, the demand on one side of the platform is interdependent with demand on the other side of the platform. *See id.*

In order to maximize the value of their networks, ISPs must consider users on each side of the market—content providers who supply the content and applications on the Internet and the broadband subscribers who demand access to Internet content. *See* J. Gregory Sidak, *The Impact of Multisided Markets on the Debate Over Optional Transactions for Enhanced Delivery Over the Internet*, 7 TELEFONICA 94 (Nov. 2011), https://bit.ly/3rX20t. In the market for broadband, complementarity of demand exists among the network, content, applications, and devices, all of which ISPs rely upon to attract subscribers. *See id.* at 100. In other words, ISPs benefit from investment in content and applications by edge providers because it increases the value of networks to subscribers.

Further, based on the motivation for laws like SB-822, it is clear that consumer demand exists for an open Internet. Consumers expect they can use broadband to access the full panoply of content online. And, as noted above, broadband markets with even a small number of firms are competitive. Thus, if consumers are systematically denied an open experience—for instance, if an ISP blocks services they wish to access—those consumers are in a position to defect to competitors that are willing to meet their needs.

The extremely limited, and hotly contested, alleged examples of blocking over the last several decades are a testament to how little blocking occurs online. In over 15 years, the only example which can be pointed to of a wireline ISP blocking content is the 2005 case of Madison River Communications, a small ISP in North Carolina, blocking Internet ports used for competitive VoIP applications. *Preserving the Open Internet Broadband Indus. Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Report and Order, 25 FCC Rcd. 17925, ¶ 35, n. 104 (2010) [2010 Order] (citing *Madison River Mgmt. Co. v. Bus. Mgmt. Software Corp.*, 387 F. Supp. 2d 521 (M.D.N.C. 2005)). The FCC settled the case against the company with no admission of wrongdoing or finding of illegal action. *Madison River Commc'ns LLC*, Consent Decree, 20 FCC Rcd. 4295 (2005). And, even the 2015 Order—the regulation upon which SB-822 was based—cited no additional examples of blocking. *C.f.* 2015 Order ¶ 65, n. 69.

Similarly, as with blocking, there have been scant examples of throttling occurring that weren't in fact instances of reasonable network management. Throttled network speeds reduce the value of broadband to consumers. As with blocking, consumers are free to switch service providers to those that do not throttle speeds, making a systematic plan to slow Internet speeds ultimately self-defeating for ISPs.

The only example of throttling cited in the 2015 Order dates back to 2008, when Comcast allegedly interfered with its customers' use of BitTorrent, a peer-to-peer application. 2015 Order ¶ 65, n.69 (citing *Comcast Network Management Order*, 23 FCC Rcd. 13028, 13054, 13057, ¶¶ 44, 49 (2008) ["2008 Comcast Order"]). While the two companies came to an agreement about how to manage BitTorrent traffic, the FCC imposed limited disclosure obligations upon Comcast. 2008 Comcast Order at 13059 ¶ 54. But this was, again, arguably an example of network management, as users of BitTorrent were using excessive bandwidth. 2018 Order ¶ 112, n. 416.

California tried to rely upon the 2018 dispute between the California fire fighters and Verizon during the wildfires as an example of impermissible throttling. Tr. at 15-16. Despite being widely characterized as impermissible throttling, the slowdown the firefighters experienced was a function of the type of data plan the department had purchased, which was not the type of mass-market retail plan to which the 2015 Order (and SB-822) applied. *See* Daniel Lyons, *One More Time: The Verizon-Santa Clara Fire Dispute Has Nothing to Do with Net Neutrality*, AEI (Nov. 13, 2019), https://bit.ly/3rRrhWd. Thus, as California has admitted, SB-822 would not have prohibited the so-called "throttling." Tr. at 16.

Further, despite predictions in the 2010 and 2015 Orders, edge providers have not exhibited demand to partner with ISPs to reduce access to competitors, opting instead to be among the strongest supporters of an open Internet. *See, e.g.*, Coalition of Technology Companies Letter to FCC (May 7, 2014), https://bit.ly/39RecpY; *see also* Ian Sherr, *Here's How Tech's Responding to the Net Neutrality Vote*, CNET (Dec. 14, 2017), https://cnet.co/39OfrpS.

ISPs have not been on their best behavior for public relations reasons. They have instead been maximizing the value of their networks by providing their subscribers with an open Internet.

Indeed, zero-rating, one of the examples of "harm" to the open Internet central to California's case actually *increases* consumer welfare. Tr. at 20-21. In arguments, California claimed that zero-rating "disproportionately affect[s] the disadvantaged or minority." Tr. at 17. But, this conclusion is exactly opposite of what the economic literature finds.

Zero-rating—the practice of not counting data used for certain content against a data cap—is typically beneficial to consumers. See 2015 Order ¶ 151; Jeffrey A.

Eisenach, *The Economics of Zero Rating*, NERA (Mar. 2015), https://bit.ly/3dLKZxw. Zero-rating is similar to a more familiar "freemium" business model common throughout the Internet and the rest of the economy in which a business offers a free or low-cost tier meant to facilitate access. Geoffrey A. Manne & Kristian Stout, Comments of the Int'l Ctr. for Law & Econ., *In the Matter Of: Telecom Regulatory Authority of India's 9/12/15 Consultation Paper On Differential Pricing For Data Services* at 4 and accompanying citations (Jan. 4, 2015), https://bit.ly/2Q5hqyN. Zero-rated broadband functions the same way when a content provider—e.g., HBO—and an ISP—e.g., AT&T—partner to provide a service that doesn't count against the consumer's data cap (unlimited streaming of HBO content). Zero-rating does *not* prevent ISP subscribers from accessing other content or applications which aren't zero rated. In fact, it frees up data for them to access more of other content and applications which aren't zero rated. *See id.* at 9.

Far from harming the disadvantaged, this practice is of special benefit to those who can only afford limited data plans. *See* Multicultural Media, Telecom and Internet Council (MMTC), *Understanding and Appreciating Zero-Rating: The Use and Impact of Free Data in the Mobile Broadband Sector* (May 9, 2016), https://bit.ly/3wJ3lrY. Particularly in the mobile context, having access to high-demand content or applications which don't count against a data cap is clearly beneficial.

B. ISPs Would Suffer Reputational Harms if they Systematically Violate Their Pledge to Keep the Internet Open

Good (or bad) reputation is an asset (or liability) for a firm, much like other intangible assets. *See* David J. Teece, Gary Pisano, & Amy Shuen, *Dynamic Capabilities and Strategic Management*, 18:7 STRATEGIC MGMT. J. 509, 521 (1997). Indeed, reputation is a "summary statistic" about a firm that dictates to other market participants—current customers, potential customers, partners, lenders, etc.—critical information about the viability of the firm and, by extension, the desirability of transacting with that firm. *Id*. Thus, the goodwill or value of a brand represents a competitive advantage when maintained (and a competitive disadvantage when abused). David J. Teece, *Intangible Assets and a Theory of Heterogeneous Firm*, in INTANGIBLES, MARKET FAILURE AND INNOVATION PERFORMANCE (Bounfour and Miyagawa eds., 2015) 217-39, at 4 in pre-proof version, https://bit.ly/3rWwqN1. Moreover, particularly in high-tech, fast moving industries, intangible assets—like brand perception—must be constantly renewed in order to remain a competitive advantage. *Id.* at 16-17.

For many years, ISPs have consistently run their networks in accord with the consumer expectation that their access to the Internet be largely unfettered. As noted above, there have been few if any actual instances of what would be classified as a "net neutrality" violation. Moreover, the FCC has also noted that the ISPs have continued to make commitments to maintaining an open Internet. 2018 Order at 395-

96, ¶ 142; *see also* NCTA, *Reaffirming Our Commitment to an Open Internet* (May 17, 2017), https://bit.ly/3wBLuD1; AT&T, *Why We're Joining the 'Day of Action' in Support of an Open Internet* (Jul. 11, 2017), https://bit.ly/3wxXFkn; Verizon, *A Time for Real Action* (Jul. 12, 2017), https://vz.to/3wvxx9M.

Apart from legal requirements, this pattern of behavior and explicit set of commitments has formed an expectation for the public. And, as noted above, the transparency regime imposed by the FCC will force ISPs to expose any practices like blocking, throttling, or paid prioritization that would constitute a violation of these expectations. Further, coordination among ISPs to organize their networks in a way that systematically violates openness principles would run afoul of antitrust law, discussed *infra* Part II (for example, by organizing a group boycott or otherwise adjusting product offerings in a way that verges on price fixing).

Therefore, the general concern at hand is whether a particular ISP will deviate from the background norm of Internet openness. Such a deviation would be both public, thanks to the transparency regime, and unilateral, or else it would look very close to anticompetitive collusion. Thus, the ISP would be forced to weigh the consequence of such action—including the reputational damage that will lead to consumers switching to more open competitors—against whatever short-run gain it believes can be had. In short, the real question is whether ISPs will engage in opportunistic behavior by attempting to derive gains from behavior that its rivals otherwise refrain from engaging in.

But, as noted above, reputation effects—ongoing damage or benefit to brand goodwill—are important assets or liabilities for firms. *See generally* Oliver E. Williamson, *Calculativeness, Trust, and Economic Organization*, 36 J. OF LAW & ECON. 453, 473-74 (Apr. 1993); *see also* Luís M B Cabral, *The Economics of Trust and Reputation: A Primer*, N.Y.U. and CEPR (Jun. 2005), https://bit.ly/3cTyr8k. ISPs engage in ongoing trading relationships with customers as well as other firms, like edge providers, who choose to co-locate and contract with an ISP for different sorts of network access. The likelihood that a consumer or edge provider will refrain from contracting with an ISP in the future should they violate their long-standing commitment to an open Internet goes up in relation to that ISP's willingness to violate the prevailing norms.

Thus, the reputational effects that attend broadband provision serve as a check on opportunistic behavior. *See* Williamson, *Calculativeness, Trust, and Economic Organization*, *supra* at 473-74 ("[R]eputation effects relentlessly track those who breach contracts… the parties have examined alternative trading scenarios and have opted for one in which the immediate gains of breach are deterred by the prospective loss of future business"). In short, concern for customer goodwill and brand reputation exerts a powerful influence on ISPs in choosing how to deploy and manage their networks.

II. EXISTING LAWS ADEQUATELY PREVENT HARMS TO CONSUMERS AND THE OPEN INTERNET

The district court correctly characterized the 2018 Order's regulatory regime as "light touch," but incorrectly deemed it as an absence of regulation. Tr. at 27-29. The 2018 Order is built on a transparency rule that requires ISPs to "disclose any blocking, throttling, paid prioritization, or affiliate prioritization." 2018 Order ¶ 219. The 2018 Order's regulatory regime therefore enables the FCC to carefully balance the ability and incentive of ISPs to invest in innovative network build out and customer solutions while maintaining its own regulatory oversight. *See* 2018 Order ¶ 210.

Meanwhile, the transparency rule permits the FCC and other relevant regulators and law enforcement agencies to know if *actual* harm occurs, enabling them to scale up regulation as needed.

Thus, the transparency rule is a building block for a comprehensive regulatory scheme. By not treating ISPs as common carriers under Title II, the FCC left room for the Federal Trade Commission ("FTC") to regulate consumer protection harms under the Federal Trade Commission Act ("FTC Act"), as well as the state attorneys general under their own state equivalent of the FTC Act. 2018 Order ¶¶ 140-41. This allows the FTC and state attorneys general to police unfair or deceptive acts and practices, including instances where ISPs make binding promises not to engage in practices such as blocking, throttling, or paid prioritization.

Moreover, the FTC, Department of Justice ("DOJ"), state attorneys general, and private plaintiffs retain the ability to bring antitrust suits against ISPs that engage in anticompetitive conduct that reduces consumer welfare. 2018 Order ¶ 148.

A. FTC, State Attorneys General, and Consumer Protection Enforcement All Constrain ISP Misbehavior

SB-822, like the FCC's 2015 Order, views the regulation of broadband through a common carrier lens. Tr. at 63-64. This is certainly a way to regulate broadband, but it is not the only one available to lawmakers. In the absence of SB-822 and the 2015 Order, broadband providers remain subject to the consumer protection authority of the FTC under Section 5 of the FTC Act, as well as to the equivalent consumer protection laws administered by the state attorneys general.

Under Section 5 of the FTC Act, the FTC has the authority to prohibit unfair or deceptive acts or practices in interstate commerce. 15 U.S.C. § 45(a)(1). A deceptive act or practice is one that "is a representation, omission, or practice that…is likely to mislead consumers acting reasonably under the circumstances, and…the representation, omission, or practice is material." *F.T.C. v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994) (citing *In the Matter of Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)). Express terms in agreements are deemed "material" for the purposes of Section 5. *Id.* at 1095-96.

Relevant here, the FTC is in a position to require the ISPs to abide by their own terms of service and other material public commitments. This works in tandem with the transparency rule, which requires broadband providers to publicly disclose network management practices that affect consumers and edge providers' use of their services. 2018 Order ¶ 209. Required disclosures include blocking, throttling, affiliated prioritization, paid prioritization, congestion management, application-specific network controls, device attachment rules, and security measures. 2018 Order ¶ 220. Taken as a whole, this collection of publicly disclosed practices constitutes an express representation of the service quality a consumer can expect from their broadband provider. For purposes of Section 5, such an express representation to provide Internet service at a given level of quality and openness would be considered "material" to consumers. *Cf.* 15 U.S.C. § 45(a). To the extent that ISPs do not honor these commitments, the ISPs would be committing a "deceptive" act under Section 5 and would be subject to equitable and monetary relief. 15 U.S.C. § 45(l)-(m); and *see* Electronic Privacy Information Center, Federal Trade Commission: Overview of Statutory Authority to Remedy Privacy Infringements, https://bit.ly/3uuom7A (last accessed Apr. 6, 2021).

Moreover, the FTC has *already* used its authority to pursue providers who deceptively advertise their consumer data plans. *Federal Trade Commission v. TracFone Wireless, Inc.,* No. 15–cv–00392–EMC, Complaint for Permanent

Injunction and Other Equitable Relief, 2015 WL 392820 (N.D. Cal. 2015). In particular, the FTC sued TracFone and obtained a settlement on the theory that TracFone had advertised unlimited data, but had actually provided a tiered service that would provide unlimited data, but at a slower rate once data was consumed over a certain threshold. *Id.* at ¶ 3.

And in 2014, the FTC sued AT&T, alleging that "it impose[d] significant and material data speed restrictions on unlimited mobile data plan customers who use more than a fixed amount of data in a given billing cycle." *Federal Trade Commission v. AT&T Mobility*, No. 14-cv-04785-EMC, Complaint for Permanent Injunction and Other Equitable Relief, at para. 49 (N.D. Cal. 2014), https://bit.ly/3rVPN8P. Ultimately, the FTC obtained injunctive relief prohibiting AT&T from materially misleading consumers with respect to promised speeds and throughput and actual performance, as well as $60M in monetary relief. *Federal Trade Commission v. AT&T Mobility*, No. 14-cv-04785-EMC, Stipulated Order for Permanent Injunction and Monetary Judgment, Case No. 14-cv-04785-EMC (N.D. Cal. 2019), https://bit.ly/31YX0dv.[3]

[3] Note that, in 2015, the FCC acknowledged that plans that slow data over certain caps was not "throttling." *See* 2015 Order at n. 281. Thus, misrepresenting speeds and data caps in this way is a consumer protection concern, not a net neutrality concern.

Indeed, it has long been the FTC's position that it can regulate consumer protection harms in broadband service provision when a company materially misleads consumers as to the nature of the service. F.T.C., *Broadband Connectivity Competition Policy Staff Report* at 129 (June 2007) ["FTC Broadband Report"], https://bit.ly/39Ra2OB.

A state-equivalent version of the FTC Act exists in essentially every state—and California's own Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 (West), is regarded as a powerful consumer protection law. "The UCL is broad in scope, embracing 'anything that can properly be called a business practice and that at the same time is forbidden by law.'" *People ex rel. Gallegos v. Pac. Lumber Co.*, 70 Cal. Rptr. 3d 501, 509 (Cal. Ct. App. 2008), *as modified* (Feb. 1, 2008).

A suit brought against Skype, an edge provider of voice-over-IP services, provides a good analogy for how such a suit would work under existing California law against ISPs. *Chapman v. Skype Inc.*, 220 Cal. App. 4th 217 (2013). In *Chapman v. Skype*, Skype advertised an "Unlimited US & Canada" calling plan, which the plaintiff purchased, assuming it permitted no caps or overage charges for calls placed within the United States and Canada. *Id.* at 222-23. In "a much smaller font" than that of the main agreement, Skype included a link to a "fair usage policy" that stated that the plan was "limited to 6 hours per day, 10,000 minutes per month and 50 numbers called per day." *Id.* at 222. There, the court held that the plaintiff had adequately alleged a deception violation of the UCL. *Id.* at 228. In doing so, the court emphasized the UCL and related California false advertising laws

> "prohibit 'not only advertising which is false, but also advertising which[,] although true, is either actually misleading or which has a capacity, likelihood or tendency to deceive or confuse the public.'… Thus, to state a claim under either the UCL or the false advertising law…'it is necessary only to show that "members of the public are likely to be deceived." ' *Id.* at 226.

Thus, given the breadth of the California UCL's ability to hold firms accountable for promises regarding service level, even where the deception was not explicit, California remains in a position to hold ISPs accountable to their stated promises much like the FTC.

B. Antitrust Law Prevents Anticompetitive Conduct from ISPs

Another regulatory tool upon which the FCC relied in its 2018 Order is the use of antitrust law to police the anticompetitive conduct of ISPs. Antitrust law operates regardless of the public representations of the ISPs and provides a parallel, but separate, set of law enforcement tools for federal enforcers. In particular, Sections 1 and 2 of the Sherman Act, as well as Section 5 of the FTC Act, provide antitrust tools that can be used to police the conduct of ISPs. *See* Sherman Antitrust Act, 15 U.S.C. §§ 1-2 ["Sherman Act §§ 1-2"]; and Federal Trade Commission Act, Section 5 (codified as amended 15 U.S.C. § 45 *et seq*).

Section 1 of the Sherman Act forbids anticompetitive agreements between firms, and Section 2 prohibits firms with monopoly power from engaging in exclusionary conduct. *See* Sherman Act §§ 1-2. In addition to the DOJ and FTC, the Sherman Act permits private antitrust suits as well and makes available treble damages. *Id*.

Indeed, much of the substantive weight of the feared harms from net neutrality violations can be characterized as different theories of anticompetitive vertical conduct. *See* FTC Broadband Report at 122-27. Blocking services from one edge provider, for example, could be characterized as a foreclosure harm, particularly since many ISPs offer a variety of services alongside broadband, such as video distribution and telephony. And if an ISP engages in contracts to prioritize some data over others, the conduct can be analyzed under an exclusive dealing theory to determine if, on net, consumers are harmed by the conduct.

A chief virtue of the FCC's move in this regard is reformulating the approach to broadband regulation from an ex ante basis to an ex post basis. As the FTC has noted in its Broadband Report, the conduct of firms—even those with local monopolies—can be either pro- or anticompetitive. FTC Broadband Report at 120. When the conduct of firms has mixed procompetitive and anticompetitive aspects, enforcers engage in a rule of reason analysis to determine, on balance, whether consumers are harmed or made better off by the challenged conduct. *Id.* at 121.

Thus, in contrast to the ex ante approach taken by SB-822, the FCC's regulatory approach in its 2018 Order prefers that ambiguous conduct be evaluated on its own merits in order to determine if actual consumer welfare harms are taking place. This approach has the benefit of permitting presumptively proconsumer innovations to develop, while simultaneously being powerful enough to deter or remedy harms. *See* Michael Kent Block, Frederick Carl Nold, & Joseph Gregory Sidak, *The Deterrent Effect of Antitrust Enforcement*, 89 J. POL. ECON. 429-445 (June 1981).

For example, California asserts that "zero-rating" is a practice that should be banned by regulatory fiat, as it is a form of paid prioritization. It may be the case that *some* instances of paid prioritization could lead to consumer harm, but there is ample evidence that it actually benefits low-income consumers. *See* MMTC, Understanding and Appreciating Zero-Rating, *supra* p. 17. Under an antitrust approach, if zero-rating were used as part of a course of anticompetitive unilateral conduct, enforcers would be in a position to stop it. But in the meantime, firms would be free to pursue zero-rating strategies that increase consumer welfare.

III. ENFORCEMENT OF SB-822 WILL RESULT IN IRREPARABLE HARM TO PLAINTIFFS AND THE PUBLIC INTEREST

The court ruled that "the balance of equities and the public interest weigh in favor of denying the injunction." Tr. at 68. The court cited the interests of the state in enforcing its law, as well as potential concerns about the contract-negotiations between, for instance, firefighters and ISPs, as a basis for its holding that the equities tipped in favor of allowing the law to be enforced. Tr. at 68-70.

In reaching its conclusion with respect to irreparable harm, however, the court did not account for the lack of legal recourse available to Appellants if SB-822 is ultimately deemed unconstitutional. Moreover, in holding that the equities tipped in favor of enforcing SB-822, the court discounted the widespread social welfare harms that could arise.

A. The Balance of Equities Tips in Favor of Appellants

The court characterized the harm the Appellants' members would suffer—including being forced to potentially reengineer networks and rearrange product offerings to consumers in order to comply with the law—as merely "economic harm" and "not… a classic irreparable harm situation." Tr. at 22. But as Appellants' counsel brought up in oral arguments—and the court did not address in its holding—the Eleventh Amendment would prevent recovery for the Appellants' members should SB-822 ultimately be held unconstitutional. *See* Tr. at 22.

In *California Pharmacists Ass'n v. Maxwell-Jolly*, plaintiffs sued California over MediCal rate reimbursement reductions. 563 F.3d 847, 852 (9th Cir. 2009) (*vacated and remanded on other grounds sub nom*. *Douglas v. Indep. Living Ctr. of S. California, Inc.*, 565 U.S. 606, 132 S. Ct. 1204, (2012)). There, the court noted that, although monetary harm is not typically considered irreparable, where the

Eleventh Amendment would bar recovery against a state in federal court, economic damages could be considered irreparable. *Id.* at 851. Thus,

> [b]ecause the economic injury doctrine rests only on ordinary equity principles precluding injunctive relief where a remedy at law is adequate, it does not apply where, as here, the Hospital Plaintiffs can obtain no remedy in damages against the state because of the Eleventh Amendment. *Id.* at 852.

At the same time, there would be few if any actual harms to the public if SB-822 were enjoined. As noted above, the underlying economics of the Internet strongly support openness. The promises made by ISPs are part of the underlying business model of broadband deployment. The small number of examples of blocking or throttling in over 15 years strongly suggests there is no business case for such practices. The reputational costs for ISPs breaking promises likewise deters them from breaking their commitments.

And, as noted above, consumer protection law and antitrust law places strict limits on the ability of ISPs to harm the public by going back on their promises, or by otherwise acting anticompetitively.

B. Enforcing SB-822 Harms the Public Interest

The public interest is harmed by failing to enjoin SB-822, for three main reasons.

First, allowing the enforcement of SB-822 will allow one state, California, to set national Internet policy due to the interstate nature of the Internet. This will stimulate a patchwork of regulations to arise, which, in turn, will raise the cost of broadband provision (and, therefore, consumer prices) and force ISPs to pull back from certain programs that could benefit consumers. For instance, AT&T has announced that it will end its sponsored data plan nationwide as a result of SB-822. *See* AT&T, *Impact of California 'Net Neutrality' Law on Free Data Services*, (Mar 17, 2021) https://bit.ly/3t0xPDh.

Second, and relatedly, SB-822's ban of zero-rating programs will create real harms for those who would otherwise benefit from them, including those with limited financial means. For example, officials from the Department of Veterans Affairs have questioned whether they will need to end a program with ISPs for its telehealth app "VA Video Connect" nationwide due to the enforcement of SB-822's ban on zero-rating programs. *See* John Hendel, *VA Asking California if Net Neutrality Law Will Snag Veterans' Health App*, Politico (Mar. 24, 2021), https://politi.co/39QXUgu. This app, designed to help veterans receive telehealth services, benefitted from zero-rating by major mobile ISPs but is now imperiled due to SB-822. *See* Randolph May & Seth Cooper, *California's Net Neutrality Law Threatens Veterans' Telehealth*, RealClear Markets (Mar. 30, 2021), https://bit.ly/3wEkQtw.

Third, the bans on paid prioritization, zero-rating, and similar programs in SB-822 will lead to upward pricing pressure for Internet service. *See* Comments of Int'l

Ctr. for L. & Econ., *Notice of Proposed Rulemaking – Restoring Internet Freedom*, WC Docket No. 17-108 at 36 and associated citations (Jul. 17, 2017), https://bit.ly/3fUNksP. As explained above, ISPs are multisided platforms. If all forms of paid prioritization are per se banned, that means that all revenue for operating networks *must* come from the consumer side of the market. Therefore, without the potential for ISPs to finance operations through partnerships with edge providers, all network investment and operations must be paid for with higher prices. Without a genuine justification—such as the existence of an anticompetitive agreement—this artificially places a heavier burden on subscribers to pay the cost of maintaining, improving, and building out the network. This will particularly hurt those in lower-income communities who have limited resources to dedicate to Internet access.

CONCLUSION

The district court wrongly concluded the balance of the equities weighed against granting an injunction. There is little gained but much to lose by enforcing SB-822. The law provides no benefit to the public beyond the economic and legal incentives which already exist to ensure openness, while imposing significant costs upon ISPs. The public interest is also clearly harmed by banning beneficial practices which would otherwise be legal, like zero rating. For the foregoing reasons, this Court should reverse the district court and grant the preliminary injunction.

Dated this 13th day of April, 2021.

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CERTIFICATE OF COMPLIANCE

9th Cir. Case Number(s) 21-15430

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This brief contains 6,889 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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I hereby certify that, on April 13, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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